

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Owners Insurance Company,

Plaintiffs,

vs.

TK Homes, Inc.,

Defendant.

4:23-cv-4017

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant TK Homes, Inc. (“Defendant”) hereby removes the above-captioned action from the Second Judicial Circuit, County of Lincoln, South Dakota, to the United States District Court for the District of South Dakota, Southern Division.

Removal to this Court is proper under 28 U.S.C. §§ 1441, 1446, and 1332 (diversity of citizenship). Removal is based on the grounds that follow.

1. On or about January 6, 2023, Plaintiff Owners Insurance Company, Defendant’s insurance provider, caused service on Defendant a summons and complaint styled for filing in the Second Judicial Circuit for the State of South Dakota, Lincoln County, and captioned, *Owners Insurance Company v. TK Homes, Inc.* (the “State Court Action”).

2. Pursuant to 28 U.S.C. § 1446, removal to the United States District Court for the District of South Dakota, Southern Division, is appropriate because this action is being removed from the Second Judicial Circuit in and for Lincoln County, South Dakota. *See* D.S.D. Civ. LR, Divisions of District of South Dakota.

3. This Notice of Removal is timely filed within thirty (30) days of service and commencement of the action against the Defendant as required under 28 U.S.C. § 1446(b).

4. This Notice of Removal is filed by all Defendants in this Action.

5. The Action is one over which the United States District Court has jurisdiction, as required under 28 U.S.C. § 1441(a), and as described below.

6. This is a civil action in which the Plaintiff seeks declaratory relief concerning whether Defendant is entitled to indemnity and cost of defense coverage under a commercial liability policy issued by Plaintiff (hereinafter the “Policy”), in relation to a negligent construction lawsuit filed against Defendant that was commenced in the Second Judicial Circuit for the State of South Dakota, Lincoln County, on or about October 3, 2022, and captioned: *Dianne K. Huisken Trust v. Tom Kvarnes and TK Homes, Inc.* (the “Trust Suit”).

7. According to the Complaint, Plaintiff is an insurance company organized under the laws of the state of Michigan, and therefore a resident of the State of Michigan.

8. Defendant TK Homes, Inc. is a South Dakota Corporation with its principal place of business located in South Dakota. Defendant is not a resident of the State of Michigan.

9. Therefore, the parties are citizens of different states.

10. Despite the Complaint seeking declaratory relief, the amount in controversy in this case is the present value of the benefits that Defendant is seeking and that Plaintiff is seeking to withhold, which includes Defendant’s potential liability under the Policy and cost of defense under the Policy. *See Burns v. Massachusetts Mut. Life Ins. Co.*, 820 F.2d 246, 249 (8th Cir. 1987) (“[w]here the heart of a cause of action is a claim for future benefits, the amount in controversy is the present value of the claimed future benefit.”); *Foret v. Southern Farm Bureau Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir.1990) (“[A]ttorney's fees may be included in

determining the jurisdictional amount.”); *see also*. *Flat Rock Riders Ch. of Nohva v. Cincinnati Specialty Underwriters Ins. Co.*, 8:16-CV-286, 2016 WL 6156195, at *3 (D. Neb. Sept. 22, 2016) (citing numerous cases holding the same and holding that amount in controversy was satisfied where value of the underlying tort action and cost of defense are more likely than not to exceed \$75,000). In the Trust Suit, the Huisken Trust alleges Defendant negligently constructed a home too low, which caused the home to be exposed to and experience inundation of flood water. The Huisken Trust is seeking monetary damages “no less than the cost of correcting those issues created by Defendants [sic] negligence and defective, faulty workmanship and restoring the Huisken Property” According to the documents provided by counsel for the Huisken Trust in the Trust Suit, the “cost of correcting” the issues claimed by the Huisken Trust will exceed \$90,000, which they are seeking as damages. Copies of the proposals produced by counsel for the Huisken Trust for the “cost of correcting” the issues claimed by the Huisken Trust are attached hereto as Exhibit 3. The cost of defending against the allegations in the Trust Suit could be significant, as it could involve the use of multiple experts, including hydraulic/hydrologists, weather experts, and construction experts. Therein, viewed separately or jointly, the amount in controversy is likely to exceed \$75,000.

11. Therefore, upon information and belief, the matter in controversy, including the defense costs and indemnification benefits, is reasonably anticipated to exceed \$75,000.

12. The claims stated in the Complaint are removable to this Court pursuant to 28 U.S.C. 1332(a) as the District Court has original jurisdiction where the matter in controversy exceeds the sum of \$75,000 and is between citizens of different states.

13. This action is a civil action that may be properly removed to this Court pursuant to 28 U.S.C. § 1441-1445 as diversity of citizenship exists and the amount in controversy exceeds \$75,000.

14. This Court has authority to hear this case pursuant to 28 U.S.C. § 2201(a) and FED. R. CIV. P. 57, because the case involves an actual controversy within this Court's jurisdiction in which the plaintiff is seeking a declaration of the contractual rights and legal relations of the parties.

15. True and correct copies of the original Plaintiff's Summons and Complaint are attached hereto as Exhibit 1 (the Trust Suit Complaint is attached as Exhibit B to the Complaint). There has been no service of other process, pleadings, or orders served on Defendant.

16. Also attached hereto as Exhibit 2 is a true and correct copy of the Notice of Filing Notice of Removal, which is being filed with the South Dakota Circuit Court for the Second Judicial Circuit, Lincoln County, South Dakota.

17. By filing the instant Notice of Removal, Defendant does not waive, and hereby fully reserves, all defenses they may have, including but not limited to, defenses of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted.

18. Written notice of this Notice of Removal is being provided to Plaintiff by service of this document on Plaintiff.

WHEREFORE, Defendant prays that this action be removed from the Circuit Court, Second Judicial Circuit, Lincoln County, South Dakota, to the United States District Court for the District of South Dakota, Southern Division.

Dated at Sioux Falls, South Dakota, this 3rd day of February, 2023.

EVANS HAIGH & ARNDT LLP

/s/ Ryan W.W. Redd

Mark J. Arndt

Ryan W.W. Redd

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PO Box 2790

Sioux Falls, SD 57101-2790

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Facsimile: (605) 275-9602

Email: marndt@ehalawyers.com

rredd@ehalawyers.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that a true and correct copy of the foregoing “Notice of Removal” was mailed by United States mail, first class postage thereon prepaid, to the following at their last known addresses, to-wit:

Ryan S. Vogel
Richardson, Wyly, Wise, Sauck & Hieb, LLP
P.O. Box 1030
Aberdeen, SD 57402-1030
(605) 225-6310
email: Rvogel@rwwsh.com

on this 3rd day of February, 2023.

/s/ Ryan W.W. Redd
Ryan W.W. Redd

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Owners Insurance Company

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Ryan S. Vogel
Richardson, Wyly, Wise, Sauck & Hieb LLP

DEFENDANTS

TK Homes, Inc.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Mark J. Arndt
Ryan W.W. Redd
Evans Haigh & Arndt, LLP

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|--|--|--|---|---|---|
| <input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |
| REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property | CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education | PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | | | |

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. 1332

Brief description of cause:
Insurance Coverage Dispute

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____